

OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES**ERRATA**

The Office of Documents and Administrative Issuances, pursuant to authority set forth in sec. 309 of the District of Columbia Administrative Procedure Act, approved October 21, 1968, and D.C. Official Code, 2001 Edition §§ 2-501 and 2-559 et seq., hereby publishes an errata to re-codify Title 24 DCMR, “Public Space and Safety” Chapter 26. Currently Title 24 DCMR has two chapters, “Transportation of Ultra Hazardous Material” and “Metropolitan Police Department Investigations of Criminal Activity Conducted Under the Guise of First Amendment Activities” incorrectly designated as Chapter 26. The publication of this errata serves as notice of the creation of a new Title 24 DCMR Chapter 27 which shall include those rules published at 55 DCR 1080 (2-2-08). The full text of those rules as established by this notice appear below. No substantive changes have been made to the Notice of Final Rulemaking as it appeared in the D.C. Register.

METROPOLITAN POLICE DEPARTMENT**NOTICE OF FINAL RULEMAKING**

The Chief of Police, pursuant to section 208(a) of the Police Investigations Concerning First Amendment Activities Act of 2004 (Act) (2006 Supp.), effective April 13, 2005 (D.C. Law 15-352, D.C. Official Code § 5-333.01 *et seq.*), hereby gives notice of the adoption of the following rules governing investigations and preliminary inquiries involving First Amendment activities, including the authorization, conduct, monitoring, and termination of investigations and preliminary inquiries, and the maintenance, dissemination, and purging of records, files, and information from such investigations and preliminary inquiries. These rules were previously published as a proposed rulemaking in the D.C. Register at 53 DCR 1571, (March 3, 2006) and again at 54 DCR 2546 (March 23, 2007). Comments were received from the American Civil Liberties Union of the National Capital Region (ACLU). Where appropriate, some of the ACLU comments were accepted and the text of the proposed rules modified accordingly. The changes to the text of the proposed rules did not amount to a substantive modification of the rules, thus there is no need for an additional period of comment.

The Chief of Police also gives notice that the final rules shall become effective upon publication in the *D.C. Register*.

Title 24 DCMR, "Public Space and Safety" is amended by adding the following new chapter 27.

CHAPTER 27 Metropolitan Police Department Investigations of Criminal Activity Conducted Under the Guise of First Amendment Activities**2700 AUTHORITY AND PURPOSE**

- 2700.1 The purpose of this chapter is to provide rules within the Metropolitan Police Department (MPD) pursuant to section 208(a) of the Police Investigations Concerning First Amendment Act of 2004 (Act) (2006 Supp.), effective April 13, 2005 (D.C. Law 15-352, D.C. Official Code § 5-333.01 *et seq.*) to govern investigations and preliminary inquiries involving First Amendment activities, including the authorization, conduct, monitoring, and termination of investigations and preliminary inquiries, and the maintenance, dissemination, and purging of records, files, and information from such investigations and preliminary inquiries. These rules do not apply to criminal investigations or inquiries that do not involve criminal activity conducted under the guise of First Amendment activities.

2701 STATEMENT OF POLICY

- 2701.1 The District of Columbia is often the site of demonstrations and MPD must be prepared to deal with those groups and individuals that come not to exercise their Constitutional rights, but rather to engage in criminal acts under the guise of First Amendment activities.

- 2701.2 The rules of this chapter are intended to assure that MPD officers will protect the guarantees of the Constitution while at the same time perform their duties with certainty, confidence and effectiveness. These rules are binding on all MPD members who are engaged in the investigation of criminal activity as they pertain to First Amendment activities.
- 2701.3 It is MPD policy that investigations involving any criminal activity conform to the guarantees of the Constitution and that care is exercised in the conduct of those investigations so as to protect constitutional rights, and that matters investigated are confined to those supported by a legitimate law enforcement purpose.

2702 GENERAL PRINCIPLES

- 2702.1 To prevent criminal activity conducted under the guise of First Amendment activities and criminal acts of civil disobedience threatening public safety or the security of the city, MPD must, at times, initiate investigations in advance of unlawful conduct. It is important that such investigations not be based on activities protected by the First Amendment. MPD members may not investigate, prosecute, disrupt, interfere with, harass, or discriminate against any person engaged in First Amendment activity for the purpose of punishing, retaliating, preventing, or hindering the person from exercising his or her First Amendment rights. However, when statements advocate criminal activity threatening public safety or the security of the city, or indicate an apparent intent to engage in such criminal conduct, an investigation under these rules may be warranted.
- 2702.2 Investigative action may be required under exigent circumstances before authorization otherwise necessary under these rules can reasonably be obtained, in order to protect life or substantial property interests; to apprehend or identify a fleeing offender; to prevent the hiding, destruction or alteration of evidence; or to avoid other serious impairment or hindrance of an investigation.
- 2702.3 When any investigative action, taken under exigent circumstances, would require an approval under ordinary conditions, such approval shall be obtained as soon as practicable in accordance with the provisions of these rules, and ordinarily will be accomplished within twenty-four (24) hours.
- 2702.4 Where a regular approval or request is required to be in writing, the approval or request following exigent circumstances shall also be in writing.
- 2702.5 Investigations shall be terminated when all logical leads have been exhausted and no legitimate law enforcement purpose justifies their continuance.
- 2702.6 Investigation of any criminal activity, committed by any person or group or member of such group, shall be initiated by, and conducted under the supervision of the Executive Director, Intelligence Fusion Division and the commanding officer, Intelligence Section. Nothing in this subsection, however, is intended to prevent any

MPD member from reporting his or her observations of suspicious conduct that involves any criminal activity by any person or group or group member, or any other criminal activity, to his or her commanding officer or to the Intelligence Fusion Division.

- 2702.7 At least once every 90 days, the commanding officer of the Intelligence Section shall inform and advise the Executive Director, Intelligence Fusion Division, concerning the status of all open investigations being conducted pursuant to these rules. This does not preclude the immediate notification to the Executive Director, Intelligence Fusion Division of any investigation of an exigent nature.

2703 LEVELS OF INVESTIGATION

- 2703.1 There are two levels of investigative activity: Preliminary Inquiry and Full Investigation.
- 2703.2 The levels are intended to provide MPD with the necessary flexibility to act in advance of the commission of any criminal activity threatening public safety or security of the city.
- 2703.3 If available information shows that the threshold standard for a preliminary inquiry or full investigation is satisfied, then the appropriate investigative activity may be initiated immediately, without progressing through more limited investigative stages.

2704 PRELIMINARY INQUIRIES

- 2704.1 Preliminary inquiries occur where MPD receives information or an allegation not warranting an investigation because there is not yet "reasonable suspicion" of any criminal activity.
- 2704.2 MPD may initiate preliminary inquiries in response to information indicating the possibility of any criminal activity threatening public safety or the security of the city.
- 2704.3 Preliminary inquiries may be opened immediately, depending on the circumstances presented.
- 2704.4 Preliminary inquiries permit MPD to respond in a measured way to ambiguous or incomplete information, with as little intrusion as the needs of the situation permit.
- 2704.5 Preliminary inquiries are used when there is no complainant involved or when an allegation or information is received from a source of unknown reliability.
- 2704.6 Preliminary inquiries are subject to the limitations on duration under Section 2704.9 and are carried out to obtain the information necessary to make an informed judgment as to whether a full investigation is warranted.
- 2704.7 Preliminary inquiries are not required when facts or circumstances reasonably indicate any criminal activity that would threaten public safety or the security of the

city. In such cases, a full investigation can be opened immediately pursuant to Section 2705.

- 2704.8 Preliminary inquiries may be authorized by the Executive Director, Intelligence Fusion Division or the appropriate supervisor of similar rank, including the Watch Commander for the Intelligence Fusion Division (who possesses the same authority as the Commander). The official authorizing the preliminary inquiry must ensure that the allegation or other information which warranted the inquiry is documented and preserved.
- 2704.9 Preliminary inquiries shall be completed within 60 days after initiation of the first investigative step. The date of the first investigative step is not necessarily the same date on which the first incoming information or allegation was received.
- 2704.10 The Executive Director, Intelligence Fusion Division, or designee of similar rank, including the Watch Commander for the Intelligence Fusion Division (who possesses the same authority as the Commander), may grant an extension of time in an inquiry for one subsequent 60-day period. All extension requests shall be in writing, and shall include a statement describing the information already collected and demonstrating why additional time is required to pursue the inquiry. The action taken on any such request for extension shall also be recorded in writing.
- 2704.11 The Chief of Police may grant an extension of time for inquiries requiring more than 120 days. All extension requests shall be in writing, and shall include a statement describing the information already collected and demonstrating why additional time is required to pursue the inquiry. The Chief of Police shall approve a preliminary inquiry under this section that is to remain open for more than 120 days, and shall do so in writing, stating the justification for the preliminary inquiry.
- 2704.12 All lawful investigative techniques may be used in preliminary inquiries, but reasonable precautions should be taken to minimize interference with First Amendment activities without impairing the success of preliminary inquiries. Undercover officers, informants, and mail covers may be used in an authorized preliminary inquiry after written approval and authorization is obtained from the Chief of Police or designee. Mail openings and wire interception and interception of oral communications, as defined in D.C. Official Code §23-541 (2001), shall not be used in a preliminary inquiry.
- 2704.13 Investigative techniques that may be used without prior authorization from a supervisor in the course of an authorized preliminary inquiry include, but are not limited to:
- (a) examination of MPD indices and files, public sources of information, including available federal, state and local government records;

- (b) interviews of complainant(s), potential subject(s), previously established informants, and other sources of information;
 - (c) interviews of persons who should readily be able to corroborate or deny the truth of the allegation, except this does not include pretext interviews or interviews of a potential subject's employer or coworkers (unless the interviewee was the complainant); and
 - (d) physical, photographic or video surveillance provided that such surveillance does not require a warrant.
- 2704.14 If there is an immediate threat of criminal activity, oral authority by the designated MPD commanding officer to use the investigative techniques described in 2704.12 is sufficient until a written authorization can be obtained; provided, that other legal requirements have been met. The required written authorization shall be obtained within 5 days of the occurrence of the emergency.
- 2704.15 Preliminary inquiries failing to disclose sufficient information to justify a full investigation shall be terminated.
- 2704.16 MPD shall record terminations of preliminary inquiries and destroy all information that would identify individuals associated with such inquiries.
- 2704.17 MPD shall maintain summaries of terminated preliminary inquiries, omitting information that would identify individuals. Such records shall be maintained in the Intelligence Section consistent with MPD's records retention schedule.
- 2704.18 All requirements regarding preliminary inquiries shall apply to preliminary inquiries that have been extended pursuant to section 2704.10 or 2704.11.
- 2704.19 A MPD member may initiate a preliminary inquiry relating to a First Amendment assembly, for public safety reasons, without authorization, as follows:
- (a) Members may gather public information regarding future First Amendment assemblies and review notices and approved assembly plans.
 - (b) Members may communicate overtly with the organizers of a First Amendment assembly concerning the number of persons expected to participate, the activities anticipated, and other similar information regarding the time, place, and manner of the assembly.
 - (c) Members may communicate overtly with persons other than the organizers of a First Amendment assembly to obtain information relating to the number of persons expected to participate in the assembly.

- (d) Members may collect information on prior First Amendment assemblies to determine what police resources may be necessary to adequately protect participants, bystanders, and the general public, and to enforce all applicable laws.

2704.20 Filming and photographing First Amendment assemblies may be conducted by MPD members for the purpose of documenting violations of law and police actions, as an aid to future coordination and deployment of police units, and for training purposes. Filming and photographing of First Amendment assemblies may not be conducted for the purpose of identifying and recording the presence of individual participants who are not engaged in unlawful conduct.

2705 FULL INVESTIGATIONS

2705.1 A full investigation may be initiated when there is reasonable suspicion to believe that the persons, groups, or organizations to be investigated are planning or engaged in criminal activity that would threaten public safety or the security of the city. A full investigation may be conducted to prevent, solve or prosecute such criminal activity.

2705.2 Reasonable suspicion is a belief based on articulable facts and circumstances indicating a past, current, or impending violation of law. The reasonable suspicion standard is lower than the standard of probable cause; however, a mere hunch is insufficient as a basis for reasonable suspicion. A suspicion that is based upon the race, ethnicity, religion, national origin, lawful political affiliation or activity, or lawful news-gathering activity of an individual or group is not a reasonable suspicion. In determining whether there is reasonable suspicion of a criminal act an investigator may take into account any facts or circumstances that a prudent investigator would consider.

2705.3 The standard for opening a full investigation is satisfied where there is not yet a current substantive or preparatory criminal act, but there is reasonable suspicion to believe that the persons, groups, or organizations to be investigated are planning or engaged in criminal activity that would threaten public safety or the security of the city.

2705.4 Any lawful investigative technique may be used in a full investigation, subject to the requirements and limitations of sections 2704 and 2706, but reasonable precautions should be taken to minimize interference with First Amendment activities without impairing the success of the investigation; except that the following techniques may be used in an authorized investigation after written approval and authorization is obtained from the Chief of Police or designee:

- (a) Wire Interception and Interception of Oral Communications, as defined in D.C. Official Code § 23-541;

- (b) Undercover officers and informants; and
- (c) Mail covers, mail openings, pen registers, and trap and trace devices.

- 2705.5 A full investigation must be authorized in writing by the Executive Director, Intelligence Fusion Division, or the appropriate supervisor of similar rank, including the Watch Commander for the Intelligence Fusion Division (who possesses the same authority as the Commander), upon a written recommendation setting forth the facts or circumstances that create a reasonable suspicion that a criminal act has been, is being or will be committed; and describing the relevance of the First Amendment activities to the recommended investigation.
- 2705.6 A full investigation may be initially authorized for a period of 120 days. An investigation may be continued upon renewed authorization every 120 days, up to one year. Renewal authorization shall be obtained from the Executive Director, Intelligence Fusion Division. All requests for renewal authorization and action thereon, shall be in writing, shall describe the information already collected, and shall demonstrate that an extension is reasonably necessary to pursue the investigation. The Chief of Police shall approve investigations open for more than one year in writing, and shall state the justification for the investigation.
- 2705.7 Authorizations shall be reviewed, every 2 months, by a panel consisting of the Assistant Chief, Intelligence Fusion Bureau, Executive Director, Intelligence Fusion Division, commanding officer of the Intelligence Section and the General Counsel, before the expiration of the period for which the investigation or any renewal thereof, has been authorized.
- 2705.8 An investigation that has been terminated may be reopened upon a showing of the same standard, and pursuant to the same procedures, as required for initiation of an investigation. All requirements regarding investigations shall apply to reopened investigations. Any information pertaining to people found to be not associated with the criminal activity will be destroyed.

2706 INVESTIGATIVE TECHNIQUES

- 2706.1 Nothing in these rules shall be interpreted as prohibiting any MPD member, in the course of his or her duties, from visiting any place, and attending any event that is open to the public, or reviewing information that is in the public domain, on the same terms and conditions as members of the public, so long as the member has a legitimate law enforcement objective; provided, that any undercover activities shall be authorized as required by sections 2704 and 2705. When conducting investigations under these rules, MPD may use any lawful investigative technique. All requirements for the use of such methods under the Constitution, applicable statutes, and MPD regulations or policies must be observed.

- 2706.2 Where the conduct of an investigation presents a choice between uses of more or less intrusive methods, MPD investigators shall consider whether the information could be obtained in a timely and effective way by the less intrusive means.
- 2706.3 Undercover officers and informants shall not:
- (a) participate in unlawful acts or threats of violence; using unlawful techniques to obtain information;
 - (b) initiate, propose, approve, direct, or suggest unlawful acts or a plan to commit unlawful acts;
 - (c) be present during criminal activity or remain present during unanticipated criminal activity, unless it has been determined in advance by an Intelligence Unit official to be necessary for the investigation;
 - (d) engage in any conduct the purpose of which is to disrupt, prevent, or hinder the lawful exercise of First Amendment activities;
 - (e) attend meetings or engage in other activities for the purpose of obtaining legally privileged information, such as attorney-client communications or physician-patient communications; and
 - (f) record or maintain a record concerning persons or organizations who are not a target of the investigation or preliminary inquiry, unless the information is material to the investigation or preliminary inquiry, or the information would itself justify an investigation or preliminary inquiry under these rules.

2707 FILES AND RECORDS

- 2707.1 The Chief of Police or designee shall evaluate information to be retained in an Intelligence Section file for the reliability of the source of the information and the validity and accuracy of the content of the information prior to filing. The file shall state whether the reliability, validity, and accuracy of the information have been corroborated. The Chief of Police or designee shall purge records that are not accurate, reliable, relevant, and timely.
- 2707.2 MPD shall not collect or maintain information about the political, religious, social, or personal views, associations, or activities of any individual, group, or organization unless such information is material to an authorized investigation or preliminary inquiry involving First Amendment activities.
- 2707.3 No information shall be knowingly included in an Intelligence Section file that has been obtained in violation of any applicable federal, state, or local law, ordinance, or regulation. The Chief of Police, or designee, shall be responsible for establishing

that no information is entered in Intelligence Section files in violation of this subsection.

- 2707.4 MPD may disseminate information obtained during preliminary inquiries and investigations conducted pursuant to these rules to federal, state or local law enforcement agencies, or local criminal justice agencies when such information:
- (a) falls within the investigative or protective jurisdiction or litigation-related responsibility of the receiving agency;
 - (b) may assist in preventing any criminal act or the use of violence, or any other conduct dangerous to human life; or
 - (c) is required to be disseminated by interagency agreement, statute, or other law.
- 2707.5 All requests for dissemination of information from an Intelligence Section file shall be evaluated and approved by the Chief of Police or designee. All dissemination of information shall be done by written transmittal or recorded on a form that describes the documents or information transmitted, and a record of the dissemination shall be maintained for a minimum of 5 years.
- 2707.6 Intelligence Section file information shall not be disseminated to any non-law enforcement agency, department, group, organization or individual, except as authorized by law.
- 2707.7 All documentation required under these rules shall be maintained by the Intelligence Section, Intelligence Fusion Division in accordance with general police department practice and applicable record retention and destruction rules, regulations and procedures.
- 2707.8 Any information pertaining to people found to be not associated with the criminal activity will be destroyed.

2708 PROTECTION OF PRIVACY AND OTHER LIMITATIONS

- 2708.1 The law enforcement activities authorized by these rules do not include maintaining files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States. All law enforcement activities authorized by these rules must have a valid law enforcement purpose and must be carried out in conformity with all applicable statutes and MPD regulations and policies.
- 2708.2 Section 2708.1 does not limit any activities authorized by or carried out under other sections of these rules. The specification of authorized law enforcement activities under this section is not exhaustive, and does not limit other authorized law

enforcement activities of the MPD unrelated to criminal investigations or inquiries if conducted under the guise of First Amendment activities.

- 2708.3 Nothing in these rules shall limit the general reviews or audits of papers, files, contracts, or other records in the possession of the MPD or the District of Columbia, or the performance of similar services at the specific request of another government agency. Such reviews, audits, or similar services must be for the purpose of detecting or preventing violations of law that are within the investigative responsibility of MPD.
- 2708.4 Nothing in these rules is intended to limit the Metropolitan Police Department's responsibilities to investigate certain applicants and employees, or to pursue efforts to satisfy any other of its legal rights, privileges, or obligations.
- 2708.5 These rules are solely for the purpose of internal MPD, Intelligence Section guidance. These rules are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of MPD.

2709 TRAINING

- 2709.1 MPD shall require all members assigned to the Intelligence Section, Intelligence Fusion Division, to attend training on the Police Investigations Concerning First Amendment Act of 2004 and the rules promulgated to implement the Act.
- 2709.2 MPD shall require all members assigned to the Intelligence Section, Intelligence Fusion Division, to sign an acknowledgement that they have received, read, understood, will abide by, and will maintain a copy of this Act and the rules promulgated to implement it.

2710 MONITORING OF INVESTIGATIONS AND PRELIMINARY INQUIRIES

- 2710.1 The Executive Director, Intelligence Fusion Division, or a commanding officer of similar rank designated in the MPD regulations, including the Watch Commander for the Intelligence Fusion Division (who possesses the same authority as the Commander), shall monitor the compliance of undercover officers and informants with the requirements of these rules.
- 2710.2 The Chief of Police shall annually prepare a report on the MPD's investigations and preliminary inquiries involving First Amendment activities. The report shall be transmitted to the Mayor and Council and a notice of its publication shall be published in the District of Columbia Register. The report shall include, at a minimum:

- (a) The number of investigations authorized;

- (b) The number of authorizations for investigation sought but denied;
- (c) The number of requests from outside agencies, as documented by forms requesting access to records of investigations conducted pursuant to this title;
- (d) The number of arrests, prosecutions, or other law enforcement actions taken as a result of such investigations; and
- (e) A description of any violations of the Police Investigations Concerning First Amendment Activities Act of 2004 or of the rules issued pursuant to that Act, and the actions taken as a result of the violations, including whether any officer was disciplined as a result of the violation.

2799 DEFINITIONS

2799.1 When used in this chapter, the following words and phrases shall have the meanings ascribed:

“First Amendment activities” means constitutionally protected speech or association, or conduct related to freedom of speech, free exercise of religion, freedom of the press, the right to assemble, and the right to petition the government.

“First Amendment assembly” means a demonstration, rally, parade, march, picket line, or other similar gathering conducted for the purpose of persons expressing their political, social, or religious views.

“Informant” means a person who provides information to the police department motivated by the expectation of receiving compensation or benefit, or otherwise is acting under the direction of the MPD.

“Intelligence Section” means the Intelligence Section, Intelligence Fusion Division, or its successor section or unit.

“Intelligence Section file” means the investigative intelligence information gathered, received, developed, analyzed, and maintained by the Intelligence Section of the Metropolitan Police Department, pursuant to an investigation or preliminary inquiry involving First Amendment activity.

“Investigation” means an examination of information that occurs when there is reasonable suspicion to believe that criminal activity or activities are being planned or conducted under the guise of First Amendment activities.

“Legitimate law enforcement objective” means the detection, investigation, deterrence, or prevention of crime, or the apprehension and prosecution of a suspected criminal; provided, that a person shall not be considered to be pursuing a

legitimate law enforcement objective if the person is acting based upon the race, ethnicity, religion, national origin, lawful political affiliation or activity, or lawful news-gathering activity of an individual or group.

“Mail cover” means the inspection and review of the outside of envelopes of posted mail and other delivered items.

“Mail opening” means the opening and inspection and review of the contents of posted mail and other delivered items.

“Minimization procedures” means reasonable precautions taken to minimize the interference with First Amendment activities, without impairing the success of the investigation or preliminary inquiry.

“MPD” means the Metropolitan Police Department.

“Preliminary Inquiry” means a basic examination of information arising from an allegation of criminal activity under the guise of First Amendment activities.

“Reasonable suspicion” means a belief based on articulable facts and circumstances indicating a past, current, or impending violation of law. The reasonable suspicion standard is lower than the standard of probable cause; however, a mere hunch is insufficient as a basis for reasonable suspicion. A suspicion that is based upon the race, ethnicity, religion, national origin, lawful political affiliation or activity, or lawful news-gathering activity of an individual or group is not a reasonable suspicion.

DEPARTMENT OF HEALTH

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health, pursuant to the authority set forth in section 19(a)(3) of the District of Columbia Pharmacist and Pharmacy Regulation Act of 1980, effective September 16, 1980, (D.C. Law 3-98; D.C. Official Code § 47-2885.18.01(a)(3)); the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981, (D. C. Law 4-29; D.C. Official Code § 48-901.01); Mayor's Order 98-48, dated April 15, 1998, Section 4902 of the Fiscal Year 2002 Budget Support Act of 2001, effective October 3, 2001, (D.C. Law 14-28; D.C. Official Code § 7-731); Section 15 of the District of Columbia Drug Manufacture and Distribution Licensure Act of 1990, effective June 13, 1990, (D.C. Law 8-137; D.C. Official Code § 48-714(a)); and Mayor's Order 98-88, dated May 29, 1998; hereby gives notice of the adoption of the following amendments to Chapter 13 (Prescriptions and Distribution) of Title 22 of the District of Columbia Municipal Regulations (DCMR) in not less than thirty (30) days from the date of publication of this notice in the D.C. Register.

The purpose of the amendments is to implement the requirement under section 7002(b) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007, effective May 25, 2007, (110 P.L. 28; 121 Stat. 112) regarding the use of tamper resistant prescription pads for written, non-electronic, prescriptions.

A notice of Proposed Rulemaking was published in the *D.C. Register* on December 21, 2007 at 54 DCR 012341. No comments were received from the public in connection with this Notice and no changes have been made. These final rules will be effective upon publication of this notice in the *D.C. Register*

CHAPTER 13 (PRESCRIPTIONS AND DISTRIBUTION) is amended as follows:**A new section 1333 is added to read as follows:****1333 PRESCRIPTION REQUIREMENTS FOR MEDICAID
COVERED SERVICES**

1333.1 Effective April 1, 2008, a written prescription for any drug, including over-the-counter drugs, for a Medicaid fee for service beneficiary shall only be written on tamper resistant prescription pads meeting at least one of the following characteristics:

- (a) The prescription pad contains one or more industry-recognized features designed to prevent unauthorized copying of a completed or blank prescription form;

- (b) The prescription pad contains one or more industry-recognized features designed to prevent erasure or modification of information written on the prescription by the prescriber; or
 - (c) The prescription pad contains one or more industry-recognized features designed to prevent the use of counterfeit prescription forms.
- 1333.2 Beginning April 1, 2009, a written prescription for any drug, including over-the-counter drugs, for a Medicaid beneficiary shall only be written on tamper resistant prescription pads meeting all of the following characteristics:
 - (a) The prescription pad contains one or more industry-recognized features designed to prevent unauthorized copying of a completed or blank prescription form;
 - (b) The prescription pad contains one or more industry-recognized features designed to prevent erasure or modification of information written on the prescription by the prescriber; and
 - (c) The prescription pad contains one or more industry-recognized features designed to prevent the use of counterfeit prescription forms.
- 1333.3 The requirements of this section shall apply whether Medicaid is the primary or secondary payor of the prescription being filled.
- 1333.4 Prescription orders transmitted to a pharmacy via telephone, telephone facsimile, or electronic prescription order are exempt from the tamper resistant requirements set forth in §§ 1331.1 and 1333.2 of this chapter.
- 1333.5 The tamper resistant requirements in § 1333.1 of this chapter do not apply to refill prescriptions of an original written prescription that was presented to a pharmacy before April 1, 2008.
- 1333.6 The exceptions set forth under Section 1927(k)(3) of the Social Security Act (42 U.S.C.S. § 1396r-8(k)(3)) concerning nursing facilities, hospitals, and other institutional and clinical settings, shall also be an exception to the requirements of this section.
- 1333.7 In the event a prescription is not submitted on a tamper resistant prescription form meeting the requirements set forth in §§ 1331.1 and 1333.2, a pharmacy may fill the prescription in full as written on an emergency basis as long as the pharmacy receives a verbal, telephone facsimile, electronic, or compliant written prescription within seventy-two (72) hours after the date on which the prescription was filled.
- 1333.8 Effective April 1, 2008, the Medical Assistance Administration (MAA) shall

only reimburse providers for covered Medicaid outpatient drugs when the written, non-electronic, prescription is executed on a tamper resistant pad meeting the requirements of this section.